

TRANSPORTATION CONTRACT

This Transportation Contract ("this Agreement") is made and entered into this 18th day of August, 2008, by and between **The City of Columbia, Missouri**, a home rule charter city and political subdivision of the State of Missouri (the "City"), and **CDC-Columbia, L.L.C.**, an Alabama limited liability company ("Capstone").

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the City and Capstone agree as follows:

1. **Definitions:**

- a. "Buses" means the 26-passenger vans (motor vehicles) described in paragraph 3 of this Agreement.
- b. "Capstone" means CDC-Columbia, L.L.C., an Alabama limited liability company, Attn: John E. Vawter, 431 Office Park Drive, Birmingham, Alabama 35223.
- c. "City" means The City of Columbia, Missouri, a home rule charter city and political subdivision of the State of Missouri, 701 East Broadway, Columbia, Missouri 65201.
- d. "Cottages" means the apartment complex and development owned by Capstone located at the southeast corner of the intersection of East Nifong Boulevard and South Bearfield Road in Columbia, Missouri, and consisting of multiple dwelling units which will be primarily occupied by students attending the University of Missouri in Columbia, Missouri.
- e. "Council" means the City Council of the City of Columbia, Missouri.
- f. "Daily Route" means the regular transportation schedule (as modified from time to time in accordance with the provisions of this Agreement) to provide regular bus service between the Cottages and the University. The initial Daily Route is specified in Exhibit A, which is incorporated herein by reference. The Daily Route may be modified from time to time in order to meet the intents and purposes of this Agreement.
- g. "Downtown Pick-Up Site" means the bus stop location at the corner of 10th Street and East Broadway.
- h. "Late Route" means the bus transportation route between the Cottages and the downtown pick-up site specified in Exhibit A which will be operated on Thursday, Friday, and Saturday evenings when the University's classes are in session from 11:30 p.m. until 1:30 a.m., as specified in this Agreement.

- i. "Routes" means the Daily Route and the Late Route.
- j. "This Agreement" means this Agreement and any attachment hereto.
- k. "University" means the University of Missouri campus in Columbia, Missouri.
- l. "University Pick-Up Sites" mean the pick-up sites in front of Brady Commons on the University's campus and the bus stop location in front of the Engineering School on the University's campus.

2. **Recitals of Pertinent Facts:** This Agreement is made in view of the following facts which the City and Capstone believe are true:

- a. Capstone is in the process of completing a large student apartment complex at the southeast corner of the intersection of South Bearfield Road and East Nifong Boulevard in Columbia, Missouri.
- b. The City's Transportation Department operates buses and public transportation through its Public Works Department. Unfortunately, the City's Transportation Department budget does not permit the acquisition of sufficient buses to meet the current demand for public transportation.
- c. Capstone desires that bus transportation be available to the residents of the Cottages on a regular basis between the Cottages and the University.
- d. Capstone believes that the Cottages require this public transportation because other apartment complexes within the City have and enjoy such transportation access for their occupants, and the availability to said other apartment complexes of regular bus service gives them a competitive advantage over the Cottages in the marketplace.
- e. The City is willing to provide regular bus transportation to the Cottages pursuant to the terms and conditions of this Agreement in consideration of the purchase by Capstone of the Buses pursuant to the terms of this Agreement.
- f. The City and Capstone believe that there is good and valuable consideration to support the various promises and undertakings specified in this Agreement.

3. **Buses:** Capstone agrees to acquire, at Capstone's expense, and thereafter to cause to be titled in the name of the City, the Buses, but only pursuant to the following terms and conditions:

a. The Buses to be acquired pursuant to this Agreement shall be passenger transportation vehicles which are eligible to be operated by the City pursuant to pertinent Federal Transportation Administration Directives and Regulations, and which have been duly inspected and certified as such pursuant to said federal regulations.

b. The Buses must be equipped with handicapped accessible ramps or lift devices which will allow persons in wheelchairs to gain access to the interior of each Bus.

c. Two substantially identical Buses shall be acquired pursuant to this Agreement by Capstone, and after acquisition shall be duly titled in the name of the City and, following such conveyance of title, shall be the separate property of the City, free from any claim thereon by Capstone except as specifically specified and allowed by this Agreement.

d. Following the conveyance of the Buses to the City, the City shall operate the Buses in accordance with the schedules hereafter described in this Agreement to provide public transportation, but primarily to assure access to public transportation on a regular basis to the occupants of the Cottages.

e. Except as is otherwise specifically set forth herein the City acknowledges and agrees that it is accepting title to the Buses in their "as is, where is" condition from Capstone.

4. **Paint and Advertising:** Capstone, at Capstone's expense, shall arrange for the Buses to be painted with the City's color paint scheme and logo. The City shall promptly furnish to Capstone the painting specifications required in this regard. Furthermore, Capstone shall have the right (and the City shall maintain) a fixed sign on the front of each of the Buses during the term of this Agreement which states "Cottages Apartments" so as to identify each of the Buses with the Routes and the fact that the Buses serve The Cottages on a regular basis. The sign of the front of the Buses shall be approximately the same size as the "reader board" signs on the front of the City's larger buses. However, the sign shall not be required to be electronic, but instead may be a weatherproof sign permanently affixed to the front of each Bus above the windshield.

5. **Term:** The term of this Agreement shall be for a period of 5 years commencing on the date the Buses are delivered to and titled in the name of the City, and ending on the fifth (5th) anniversary of such date. However, this Agreement may be renewed for an additional period of 5 years thereafter upon the following terms and conditions:

a. If Capstone desires to renew this Agreement for a subsequent period of 5 years (the "Renewal Term"), then Capstone shall give written notice of Capstone's intent and desire to renew this Agreement for said additional 5 year period no less than 31 days prior to the fifth anniversary date of the initial term of this Agreement.

b. Such notice to renew shall expressly state Capstone's acknowledgment that it is responsible for the maintenance of the Buses during the Renewal Term.

c. Capstone shall have the right (but not the obligation) to exercise this option to renew at any time prior to the thirty-first (31st) day prior to the expiration of the initial term of this Agreement.

6. **Operational Costs (Drivers):** During the term of this Agreement (and the Renewal Term), the operators of the Buses shall be City employees, supervised by the City, and operating in accordance with pertinent City regulations and requirements. No operator of any Bus shall be considered at any time to be under the control of, employed by, or agents of Capstone. The City shall at all times be responsible for the discipline, compensation of, supervision of, and employment of the drivers who operate the Buses during the term of this Agreement (including the Renewal Term). All fuel costs and costs related to the operation of the Buses during the term of this Agreement (including the Renewal Term elected by Capstone) shall be paid by the City.

7. **Maintenance During Initial Term:** During the initial 5-year term of this Agreement, the City shall be responsible for all items of maintenance involving the Buses. The City shall be entitled to and shall succeed to any warranty with respect to the Buses (either manufacturer warranties or after-market installation warranties). The City shall be entitled to prosecute in its own name any warranty claims required in order to maintain the Buses in good and serviceable condition during the initial 5-year term of this Agreement.

8. **Maintenance During Renewal Term:** During the Renewal Term (if elected by Capstone), Capstone shall be responsible to reimburse the City for the maintenance of the Buses, which shall be at Capstone's expense. The City shall arrange for all such maintenance and shall bill Capstone for the costs associated with maintaining the Buses in good and serviceable condition during the Renewal Term.

9. **Insurance and Liability:** During the term of this Agreement (including the Renewal Term, if elected by Capstone), the City shall insure or shall self-insure, in reasonable amounts, against liability to any person for personal injuries or for property damage caused by the negligent or improper operation of the Buses. The City shall be treated as the owner and operator of the Buses in all respects and at all times, and shall be entitled to whatever principles of sovereign immunity may apply under the laws of the state of Missouri with respect to said operations. However, in any and all events, Capstone shall have no liability whatsoever under any circumstances for any injury caused to any person or damage caused to any property as a result of the operation of the Buses during the term of this Agreement (including the Renewal Term).

10. **Routes:** The Buses will be operated by the City so as to conform to the Routes during the University's regular school term in accordance with the following:

a. The "regular school term" during which the Buses shall be operated on the Routes hereafter described shall be considered as those times when the University's classes are in session. Accordingly, the City shall not be required to provide the bus service described in this Agreement during Thanksgiving vacation, Christmas vacation, Spring Break, or the summer months.

b. The Daily Route over which the Buses are required to be operated shall be an established bus route schedule substantially in accordance with that attached hereto as "Exhibit A", except that the initial or first pick up site at the commencement of each day's route for a Bus shall be the Cottages, and thereafter each Bus shall proceed as specified in Exhibit A (generally along Nifong and Grindstone Parkway and then north on Providence Road) stopping (as space in the Bus permits) at public pick-up points for other paying passengers.

c. The Daily Route shall be operated from 7:00 a.m. until 6:00 p.m. Monday through Friday and shall require a Bus (or a Bus with residents of the Cottages who desire transportation to the Cottages) to appear at the Cottages' pick-up site approximately each thirty (30) minutes during the week.

d. From the Cottages' pick-up site, each Bus shall proceed along the streets specified above to pick-up sites at Brady Commons and the School of Engineering areas adjacent to City shelters at those locations, and shall pick up Cottages residents wishing to be transported back to the Cottages from those locations via the Daily Route roads to the Cottages. However, the Parties recognize that the University Pickup Sites are owned by the University, and may be relocated by the University in the future, in which event the Parties may have to agree to specify different locations as the University Pickup Sites.

e. In addition to the Daily Route, the Buses shall be operated on the Late Route on Thursday evenings, Friday evenings, and Saturday evenings during the University's school term so that passengers who desire said late night transportation can obtain same through the Late Route operation of the Buses each thirty (30) minutes during the period 11:30 p.m. through 1:30 a.m. on those nights.

f. The Routes shall be subject to adjustment from time to time as ridership patterns become apparent so as to permit the City to accommodate peak demand times, slack demand times, and traffic patterns along the Route. The City shall have reasonable flexibility in redesigning the Routes so long as the intents and purposes of this Agreement are preserved and observed. The Routes as reflected on Exhibit A and as adjusted by the City hereafter shall at all times reflect a reasonably direct route from the Cottages at one end to the University Pickup Sites or to the Downtown Pickup Site (as the case may be) on the other end.

11. **No Charge to Students Who are Residents of Cottages:** The City shall not charge any person who is a bona fide resident of the Cottages for riding on the Buses, either to the University or from the University to the Cottages. Capstone shall furnish each bona fide

resident of the Cottages with appropriate identification cards so that it will be relatively easy for the City's drivers to confirm that a passenger on a Bus is a bona fide resident of the Cottages.

12. **Adjustments to Schedule:** The City shall have the right to modify its routes for the Buses from time to time to assure that the Buses are reasonably full of riders and shall not be required to maintain a schedule when custom and practice indicates that ridership to and from the Cottages is not needed. However, the City recognizes that the primary purpose of this Agreement is to assure residents of the Cottages convenient, predictable, and regular transportation between the University and the Cottages, and the City shall modify the schedule of the Buses only if it can do so without violating this principle and primary purpose.

13. **Good Faith Adjustments:** The arrangements specified in this Agreement represent new concepts and may require that Capstone and the City meet and confer on a regular basis and enter into reasonable and good faith adjustments to this Agreement in the event either Capstone or the City believes that adjustments are required. The parties agree to modify this Agreement in order to preserve the intents and purposes hereof if subsequent circumstances reasonably require such modifications.

14. **Contingency (Inspection of Buses):** The City's obligations under this agreement are subject to and contingent upon the City's inspection and approval of the Buses. The City shall have the right to reject the Buses (and therefore to declare this Agreement void) if, in the reasonable opinion of the City, the mechanical condition of the Buses is not adequate or sound. The City shall promptly inspect the Buses as soon as reasonably possible after the delivery of the Buses to the City and shall confirm in writing its acceptance or rejection thereof.

15. **Miscellaneous:**

a. **Binding Effect.** This Agreement shall be binding upon and inure to the benefit of the respective successors, heirs, and legal representatives of the parties hereto.

b. **Missouri Contract.** This Agreement shall be deemed a Missouri contract and construed according to the laws of such state, regardless of whether this Agreement is being executed by any of the parties hereto in other states or otherwise. The proper venue for any action concerning this Agreement shall be Boone County, Missouri.

c. **Counterparts.** This Agreement may be executed in several counterparts, each of which shall be deemed an original.

d. **Time.** Time is of the essence in this Agreement. If the final day of any period which is set forth in this Agreement falls on a Saturday, Sunday, or legal holiday under the laws of the United States or the state of Missouri, then in such event, the duration of such period shall be extended to the next day which is not a Saturday, Sunday, or other legal holiday. Any reference to a time of day (e.g., 12:00 noon) shall refer to the time of day in Columbia, Missouri.

e. Construction. The paragraph headings, captions, or abbreviations are used for convenience only and shall not be resorted to for interpretation of this Agreement. Whenever the context so requires, the masculine shall refer to the feminine, the singular shall refer to the plural, and vice versa.

f. Waiver. Except as otherwise specified herein, no waiver of any provision of this Agreement shall be effective unless it is in writing and signed by the party against whom it is asserted, and any such waiver shall only be applicable to the specific instance to which it relates and shall not be deemed to be a continuing or future waiver.

g. No Adverse Inference. This Agreement shall not be construed more strongly against one party or the other. The Parties to this Agreement had equal access to, input with respect to, and influence over the provisions of this Agreement. Accordingly, no rule of construction which requires that any allegedly ambiguous provision be interpreted more strongly against one party than the other shall be used in interpreting this Agreement.

h. Entire Agreement: This Agreement sets forth all the promises, covenants, agreements, conditions, and understandings between the parties hereto and supersedes all prior and contemporaneous agreements and understandings, inducements, or conditions, expressed or implied, oral or written, except as herein contained. This Agreement may be modified only by an agreement in writing signed by the parties to this Agreement.

i. Notices: Any notice given or required to be given, unless otherwise provided, shall be in writing and shall be deemed to have been delivered, whether actually received or not, three (3) days after being deposited in the United States Mail, postage prepaid, registered or certified mail, return receipt requested, addressed to the City or Capstone, as the case may be, as shown below:

If To City:	H. William Watkins, City Manager City of Columbia 701 East Broadway Columbia, MO 65201
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Copy to:	Fred Boeckman, City Counselor City of Columbia 701 East Broadway Columbia, MO 65201
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If To Capstone:	CDC-Columbia, L.L.C. Attn: John E. Vawter 431 Office Park Drive Birmingham, AL 35223
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Copy to:	Craig A. Van Matre
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Van Matre, Harrison, Volkert, and Hollis, P.C.
1103 E. Broadway
P. O. Box 1017
Columbia, MO 65205-1017
(Attorney for Capstone)

IN WITNESS WHEREOF, the Parties have entered into this Agreement as of the day and year first above written.

The City of Columbia, Missouri, ("City")

By: _____
H. William Watkins, City Manager

Attest:

Sheela Amin, City Clerk

APPROVED AS TO FORM:

Fred Boeckman, City Attorney

CDC-Columbia, L.L.C., an Alabama limited liability company

By: **Capstone Development Corp.,** as
its sole member

By: _____
Name: _____
Title: _____